Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	DOCKET FILE COPY ORIGINAL
	)	
Computer III Further Remand	)	
Proceedings: Bell Operating	)	CC Docket 95-20
Company Provision of	)	
Enhanced Services	)	

REPLY COMMENTS

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SUMMARY

Substantial and credible evidence has been presented demonstrating that a policy permitting integration of the BOCs' enhanced and basic services, subject to nonstructural safeguards, generates measurable public benefits. Whether presented in numbers of customers, revenues, growth rates, consumer welfare, or any other measure, the data lead to the inescapable conclusion that the public has benefitted substantially under the Commission's Computer III policies. Moreover, these benefits have not been gained at the expense of a competitively functioning marketplace. Significantly, parties whose responsibility it is to view issues raised in the Notice from the same public interest perspective as the Commission agreed that structural separation imposes substantial and undesirable costs on the public.

In contrast with the evidence presented by the BOCs, opponents have resorted to tabloid style pleadings, taking partial or irrelevant information, distorting it, and mixing it with hearsay and innuendo to piece together sensational claims of widespread abuses by the BOCs. Even minimally closer scrutiny of a fair sampling of these claims reveals their gross lack of credibility. Opponents have presented no credible showing that structural relief is not publicly beneficial.

The Commission also should be wary of attempts to embroil it in resolution of extraneous issues. The

Commission need not consider opponents' view of the "regulatory status quo" in order to adopt a policy to be implemented on a going forward basis. Nor does the Commission need to address or resolve the myriad issues raised by local exchange competition in order to adopt effective safeguards for BOC participation in enhanced service markets.

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BellSouth Telecommunications, Inc. ("BellSouth"), hereby responds to comments submitted in the above-referenced docket.[1]

INTRODUCTION

In its Notice,[2] the Commission solicited input that would assist it in developing a policy decision on the proper regulatory framework and associated safeguards for the former Bell Operating Companies' ("BOCs") participation in enhanced service markets. Substantial and credible evidence was provided that a policy permitting integration of enhanced and basic services, subject to nonstructural safeguards, generates measurable public benefits.

Conversely, no credible evidence of any quantifiable public benefit of a separate subsidiary requirement was offered. Rather, opponents of structural relief, i.e.,

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[1] A list of commenting parties and the abbreviations used herein is included in Attachment A.

[2] Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Notice of Proposed Rulemaking, CC Docket No. 95-20, FCC 95-48 (rel'd Feb. 21, 1995) ("Notice").

those who have a vested, private interest in the BOCs being hamstrung by unnecessary regulation, were left to resort to misrepresentation, innuendo, and hearsay.

The bottom line, as the comments indicate, is that the Commission's policy permitting structural integration has allowed millions of consumers to obtain services that otherwise were unavailable to them, while competition in those and all enhanced service markets has continued to thrive. On the basis of this record, the Commission has little choice but again to adopt a policy favoring structural integration of the BOCs' enhanced service operations.

I. A Wealth of Evidence Demonstrates Substantial Public Benefits of Vertical Integration.

As BellSouth observed in its Comments, the Notice sent a clear indication that the Commission would rely in this proceeding on demonstrable evidence and experience, rather than hyperbole and hysteria. In response to this indication, the BOCs have presented a wealth of objective and quantifiable data based on current experience, both of the BOCs individually and of enhanced service markets more globally. In contrast, opponents of structural relief have again hidden behind their traditional doom and gloom predictions and have practically ignored that their own industry has grown at explosive rates under the very policies they criticize. The record is clear that vertical

integration of enhanced and basic service affects the public interest beneficially.

Whether presented in number of customers,[3] revenues,[4] growth rates,[5] consumer welfare,[6] or any other measure,[7] the data lead to the inescapable conclusion that the public has benefitted substantially under the Commission's Computer III policies. It is well established that millions of individuals are now taking advantage of the opportunities presented by integrated voice messaging services.[8] Moreover, these services are available as a choice to tens of millions more customers, leading to continued innovation and improvement in competing sources of such services, such

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[3] See, e.g., NYNEX at 20, 25; Bell Atlantic at 5, 10-11; US West at 12; SBC at 3, 13; Pacific at 16-17; BellSouth at 52-53.

[4] See, e.g., NYNEX at 20; Bell Atlantic at n.7, n.9, 8, 12; US West at 12; Ameritech at 3-4, 6; SBC at 7, 11-12; Pacific at 7, 9; BellSouth at 56, n.69.

[5] See, e.g., NYNEX at 20-21, 25; Bell Atlantic at 8; US West at 12; Ameritech at 3; SBC at 8-9, 11-12; Pacific at 7-48.

[6] See, e.g., Hausman and Tardiff study appended to each of the BOCs' comments, passim.

[7] See, e.g., NYNEX at 26 (substantial price decreases); Bell Atlantic at 7 (creation of new markets), 8-9 (price decreases); US West at 12 (increased sales by competitors due to BOC's advertising of its own service); SBC at 10-26 (substantial competition and competitors in all market segments); Pacific at 18 (packaging of new and lower-priced service options); BellSouth at 53 (rapid penetration growth showing previously existing, but unmet, demand for new services), 55 (new feature development in CPE based alternatives).

[8] See note 3, supra.

as CPE, and maintaining downward pressure on prices of those alternatives.[9] Thus, even customers who do not buy the BOCs' services realize appreciable benefits from the Commission's policies.

Moreover, the benefits to consumers have not been gained at the expense of a competitively functioning marketplace. To the contrary, the marketplace has not only remained competitive across enhanced service segments, but has been among the fastest growing sectors of the national economy.[10]

That much of this growth has occurred with only nominal participation by the BOCs in certain market sectors is hardly damning criticism of the Commission's policies. In fact, such results prove the effectiveness of both prongs of the Commission's ONA initiative,[11] rather than undermine it. That the BOCs have not parlayed structural relief into a position of market dominance, as opponents of structural relief routinely have asserted the BOCs would do, validates the Commission's rejection of those assertions and the Commission's reliance on nonstructural requirements as

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[9] See BellSouth at 54-56.

[10] See note 5, supra.

[11] In its Comments, BellSouth encouraged the Commission to maintain its perspective that distinguishes between those safeguards designed to ensure BOCs participating in enhanced service markets do so in a nondiscriminatory manner and other requirements designed to foster service development opportunities for all enhanced service providers. BellSouth at 8-11.

effective safeguards against such results. That the marketplace has nonetheless grown at double digit rates confirms that nonaffiliated ESPs are obtaining network services to provide the enhanced services demanded by the consuming public.

Indeed, as the Hausman and Tardiff study appended to each of the BOCs' comments demonstrates, if the opportunity for BOC participation in enhanced service markets had undermined competition, output would be expected to fall and prices to rise as BOCs came to dominate the market.[12] As has been shown, just the opposite has occurred. Prices have fallen, the variety and volume of available services has grown dramatically, and service providers of all sizes have thrived in this competitive environment.

In contrast with these tangible, measurable benefits to the consuming public that derive from a policy of structural relief, the only "benefits" articulated by opponents of such relief are not public benefits at all. Rather, the benefits would inure solely to the proponents of structural separation who would gain the satisfaction of effectively precluding a potential competitor from entering the market. The Commission should not be led to substitute that measure of benefit as the yardstick by which to measure public benefit.

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[12] Hausman and Tardiff at n.6.

Significantly, the two parties whose responsibility it is to view issues raised in the Notice from the same public interest perspective as the Commission agreed that structural separation imposes substantial costs on the public. As New York observed:

> [R]equiring separate subsidiaries may result in customer confusion or inconvenience associated with the loss of branding and one-stop shopping, a reduction of potential synergistic savings, and the creation of additional costs that are ultimately borne by the consumer.
>
> . . .
>
> A general requirement of separate subsidiaries for all enhanced services would result in inefficiencies and over-regulation for many potentially beneficial customer services. In sum, it is contradictory to attempt to foster industry creativity and diversity by establishing an inflexible policy requiring separate subsidiaries.[13]

Wisconsin expressed similar views about the detrimental public interest consequences of structural separation:

> Structural separation would impose substantial additional costs without commensurate benefit. Structural safeguards would require changes in service delivery, such as separate staffs, that would be both inconvenient and confusing to final customers. Structural safeguards would also foreclose the opportunity to achieve economies of scale and scope which would ultimately benefit all consumers. In short,

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[13] New York at 2, 5. While New York also advocates that states should retain the authority to impose separate subsidiary requirements on a case-by-case basis, the Commission's preemption of such authority based on a federal policy of structural integration was expressly upheld by the Ninth Circuit. California v. FCC, 39 F.3d 919 (9th Cir. 1994), cert. denied, ___ U.S. ___ (April 3, 1995).

> [Wisconsin] believes the reimposition of structural safeguards would be a step backwards in regulation and impede achievement of market efficiency.[14]

In short, the record is replete with evidence of actual and substantial public benefits of structural relief. These public benefits far outweigh the private benefits the BOCs' competitors would reap under structural separation. Moreover, as shown below, the purported costs of structural relief do not withstand even minimal scrutiny and thus do nothing to undermine the public benefits that are to be achieved. Structural relief clearly is in the public interest.

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[14] Wisconsin at 6. Wisconsin also implicitly concurs in BellSouth's observation, BellSouth at 9-13, that questions concerning the appropriate model of ONA or degree of unbundling are not inherently related to issues of structural integration and safeguards against discrimination:

> ONA is intended to provide nondiscriminatory access to network services. It should not be the impetus for reimposition of structural separation requirements simply because the model of ONA adopted is more limited than that envisioned in the original Computer III decision. . . . The primary need is that competitors must have nondiscriminatory access to all elements or services that LECs use in their provision of enhanced services.

Wisconsin at 8.

II. Opponents Have Provided No Credible Evidence of Abuse by The BOCs.

"ELVIS SPOTTED AT BOC CAFETERIA"

"ALIENS ABDUCT BABY BELL"

"BOCS THWART COMPETITION, ABUSE CONSUMERS"

In tabloid journalism style pleadings, opponents of effective BOC participation in competitive enhanced service markets once again have taken partial or irrelevant information, mixed it with hearsay and innuendo, and added their own self-serving hypotheses to piece together sensational claims of widespread abuses by the BOCs.[15] These claims are then offered as "proof" that the Commission's nonstructural safeguards are ineffective. However, even a brief review of a sampling[16] of these claims reveals that they, like most tabloid stories, have no

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[15] As a result of such tactics, Hatfield's observation that "regulators must rely on imperfect information about virtually everything relevant to the decision they make," Hatfield at 37, becomes a self-fulfilling prophecy.

[16] Providing exhaustive rebuttal to each of the alleged bad acts and controverting or correcting every instance of mischaracterization of events or other regulatory proceedings is unnecessary to demonstrate opponents' propensity to misconstrue decisions made or actions taken in contexts that, in many cases, had no material relevance to enhanced service offerings or did not even involve a BOC. See, e.g., MCI at 43-44 (GTE audit); CompuServe at 33-34 (same); ITAA at 44-45 (same). Sufficient information is presented herein, however, to demonstrate that opponents' claims cannot be taken at face value and that, because of their inaccurate portrayal, such claims carry no probative weight. For this purpose, BellSouth concentrates its comments on a number of the allegations directed at it.

substance and cannot be relied upon as "evidence" of failure of the Commission's safeguards.

Several opponents assert the inadequacy of the Commission's accounting safeguards and offer gross distortions of current or past events to support their claims. CompuServe, for example, refers to a series of show cause orders[17] by the Commission regarding a review of adjustments to the common line pool in 1988-89 by the largest LECs as "examples of cross-subsidization".[18] As an initial matter, CompuServe fails to explain its use of the term "cross-subsidization" or to explain how the allegations contained in the show cause orders relate to cross-subsidization. Furthermore, CompuServe fails to explain how the issues raised in these proceedings could have resulted in "anticompetitive injury already inflicted on the BOCs' competitors."[19]

In fact, the issues raised in the reviews cited by CompuServe did not impact either ratepayers or competitors. Neither Ernst & Young nor the Commission has asserted that

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[17] Typical of the wordplay practiced by opponents, CompuServe characterizes these orders as "decisions", whereas in fact they are mere allegations. BellSouth provided a full response to these allegations in BellSouth Telephone Operating Companies, AAD 93-148, "Response to Order to Show Cause", filed May 2, 1995. In that response, BellSouth demonstrated that it has committed no violation of the Communications Act or the Commission's rules, contrary to the allegations of the order to show cause.

[18] CompuServe at 27-36.

[19] CompuServe at 31.

the issues reviewed had an impact on NECA's common line rates. The issues involved cost recovery from the common line pool by individual LECs. If a LEC over-recovers its costs from the pool, the rate of return for the pool is driven down, and the remaining LECs, not their customers, are disadvantaged.

In this case, the reviews by Ernst & Young demonstrated that, in aggregate, the large LECs under-recovered their costs from the common line pool.[20] CompuServe thus grossly misrepresents the potential impact of the alleged violations cited in the show cause orders. CompuServe asserts that "the audits indicate that the BOCs misstated or misallocated approximately $120 million in interstate costs and revenues during the audit period."[21] What CompuServe conveniently overlooks is that the pluses and minuses in the items essentially offset, so that the net impact of the alleged violations is that the large LECs under-recovered their

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[20] As NECA's report to the Commission stated:

> A summary of the quantifiable findings shows that on balance Subset I carriers under-reported their claims to the Common Line Pool by approximately $9.7 million. The $9.7 million represents about one-tenth of one percent of the Subset I carriers' Common Line Pool revenue requirements for the period reviewed ($8.9 billion).

Letter from Lawrence C. Ware, Chairman of the Board of NECA, to Ms. Donna R. Searcy, Secretary, Federal Communications Commission, dated September 9, 1991 (AAD 91-24).

[21] CompuServe at 30.

costs from the common line pool by approximately $10 million. On a $9 billion base, such an error, even if proved, is wholly immaterial. CompuServe's gross exaggerations thus cannot justify the draconian remedy of the imposition of structural separation requirements on the BOCs.

Continuing its effort to cast doubt on the adequacy of the Commission's accounting safeguards, CompuServe is joined by Hatfield and ITAA in attempting to interject crisis level concern over the Commission's alleged inability to perform its duties diligently.[22] These parties find support for their contention in testimony by Chairman Hundt in 1994 appropriations hearings before Congress. Again, however, what these parties overlook, whether through ignorance or otherwise, is that Chairman Hundt's 1995 testimony confirms that whatever the Commission's staffing problems were in 1994, they have now been fully addressed:

> Following my testimony last year before this Committee, at which time I outlined the Commission's significant understaffing in [non-cable] areas, we received an additional appropriation for FY 1995 that permitted us to add additional FTEs, bringing us to our current total of 2,271. We are very grateful to the members of this Committee, including you, Mr. Chairman, who last year listened very sympathetically to my testimony about serious, chronic understaffing at the FCC. And we are grateful to the Congress for

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[22] Hatfield at 46; CompuServe at 36; ITAA at 39-41.

> providing us with a staffing level that I believe is now sufficient to achieve our mission.[23]

Opponents' use of outdated information should not be rewarded.

Opponents similarly attempt to portray regulatory proceedings in various states as further evidence of failure of the Commission's safeguards or, more generally, indicators of rampant unscrupulous behavior by the BOCs. As before, closer inspection reveals the distortion practiced by these parties.

BellSouth has already addressed in detail both the errors and mischaracterization of the Georgia PSC's "findings" of "access discrimination" in the Georgia MemoryCall Order.[24] As expected, opponents continued to distort that decision, as well as the Ninth's Circuit recognition of it.[25] Several went on to rehash, as well as

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[23] See, "Statement of Reed E. Hundt, Chairman, Federal Communications Commission, on FY 1996 Budget Estimates" before the Subcommittee on Commerce, Justice, and State, the Judiciary and Related Agencies, Committee on Appropriations, U.S. House of Representatives, March 22, 1995, at p. 18.

[24] BellSouth at 32-50.

[25] See, e.g., ITAA at 18 ("Like the Georgia Public Service Commission, the [Ninth Circuit] found that BellSouth had discriminated against competing enhanced service providers . . . .") (emphasis added). Of course, the court made no such finding, and could have made no such finding, because no such question was presented to it. Further exemplifying ITAA's propensity to promote misunderstanding of plain language, ITAA similarly distorts the court's decision by restating the court's description of CEI "[i]n other words" that are totally at odds with the court's own words:

(continued...)

misrepresent, other aspects of that decision, that even the Ninth Circuit did not find worthy of reiteration.

In the most egregious case, MCI, in a statement as unequivocal as it is untrue, asserts that the Georgia PSC found that BellSouth was "using CPNI to identify particular customers of existing VMS competitors for 'targeted' marketing efforts."[26] Not surprisingly, MCI provided no citation to the Georgia PSC's Order to support its assertion. That is because, as a thorough review of the Order reveals, there is no such finding by the Georgia PSC.

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[25](...continued)

> In other words, CEI is designed to prevent access discrimination only when an enhanced service provider wishes to provide the exact same service in the exact same manner as the BOC.

ITAA at 17, n.28 (emphasis added). This interpretation was appended to ITAA's quotation of a portion of the court's decision which stated:

> While CEI and the nondiscrimination reporting requirements are designed to prevent BOC discrimination against other enhanced service providers where a BOC is providing its own service, these safeguards do not enable enhanced service providers to pick and choose network service elements to design and develop enhanced services.

ITAA at 17, quoting California III, 39 F.3d at 939. Of course, nothing in this passage states, nor has this Commissioner ever proposed, that CEI is limited only to those circumstances suggested by ITAA, i.e., exact same enhanced services in the exact same manner. ITAA's attempts to place such a spin on the Ninth Circuit's decision must be rejected.

[26] MCI at 29.

Misrepresentations to the Commission of this type should not and need not be tolerated.[27]

ATSI similarly asserts incorrectly that the Georgia PSC's conclusions in the MemoryCall case regarding BellSouth's use of CPNI, which was in accordance with the Commission's rules, warrants revision of those rules.[28] This argument is nonsense for two reasons. First, as ATSI begrudgingly acknowledged, the Ninth Circuit expressly upheld the Commission's rules and its preemption of conflicting state rules.[29] Second, even before the Ninth Circuit's decision, the Georgia PSC, in a proceeding that post-dated the MemoryCall decision, expressed its acceptance

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[27] See e.g., 47 CFR Section 1.24. The same misrepresentation already has been perpetrated on the Ninth Circuit. See MCI Comments, Appendix A, which is an excerpt of the Reply Brief of Petitioners MCI Telecommunications Corporation in Case No. 92-70186, and Newspaper Association of America, in Case No. 92-70261, at 16 (September 8, 1993), People of the State of California v. FCC, No. 92-70083 and consolidated cases (Ninth Circuit).

[28] ATSI at 5.

[29] Id.

of the Commission's CPNI rules.[30] Again the MemoryCall decision fails to provide support for opponents' arguments.

ATSI and others also assert that a mere handful of complaints from customers about misapplication of the CPNI rules warrants elimination of the BOCs' ability to use CPNI in marketing enhanced services to their customers.[31] First, the smattering of incidents identified over a multi-year period indicates that the rules are being followed, not that they are being grossly abused. Second, arguments that the CPNI rules need to be tightened against BOC use of such

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[30] See, Review of Open Network Architecture, Order, GPSC Docket No. 4018-U (Sept. 29, 1993):

> One of the safeguards imposed by the FCC in its removal of the separate subsidiary requirement for Southern Bell was a set of rules that addressed access to, and use of, customer proprietary network information (CPNI) by Southern Bell and non-affiliated parties. Through multiple proceedings, the FCC has refined its rules to reflect what it believes is a proper balance of three competing interests: customer privacy, service efficiencies, and competitive equity. Additionally, the FCC has preempted state commissions from adopting CPNI rules that require prior customer authorization for access to CPNI whenever such authorization is not required by the FCC's rules. Under these circumstances, the Commission agrees with those parties, including Staff, who suggest that our decision approving Southern Bell's tariffs herein should not be jeopardized or delayed by consideration of CPNI issues in this proceeding.

Id. at 6.

[31] See, e.g., ATSI at 8-9; ITAA at 29-31.

information are misplaced. As noted above, the Ninth Circuit expressly upheld the CPNI provisions of the Commission's earlier decision in the face of the very arguments the opponents are raising now. If anything, record information before the Commission in this and other proceedings shows that the CPNI rules as currently implemented are confusing to customers and unfairly burden the BOCs' marketing efforts.[32]

So desperate are opponents to offer some evidence of bad behavior by the BOCs that they reach for events totally unrelated to enhanced service activities and then distort the presentation of those events. Again using MCI as an example, the reference to BellSouth's settlement with the State of Florida[33] is not only irrelevant, but also reflects an ignorance of the circumstances underlying that settlement. First, as BellSouth has previously disclosed and as MCI should be aware, BellSouth itself discovered and reported to authorities the issues that gave rise to the State's investigation. Moreover, the alleged acts that were involved, to the extent they took place, were the acts of individuals who were acting contrary to BellSouth's policies and procedures. It was for this very reason that BellSouth

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[32] See, e.g., Bell Atlantic at 25-29. BellSouth concurs in Bell Atlantic's proposal that the Commission take steps to eliminate the confusion and costly burdens caused by the current CPNI rules.

[33] MCI at 38.

reported these incidents to the appropriate authorities. At no time has there been any finding of corporate wrongdoing. Furthermore, even to the extent any individual wrongdoing may have occurred, it did not involve any leveraging of monopoly power to gain an advantage in some adjacent market, as MCI claims.[34] Rather, the allegations were limited to purported acts by a few individuals regarding the sale of certain services and the reporting of network troubles to the Florida Public Service Commission. Again, MCI has over-reached to try to make an unsupportable point.

ITAA similarly overextends in its description of the "Southern Bell audit."[35] This description is initially misleading insofar as it refers to Georgia PSC "conclusions." The PSC has not, in fact, reached any conclusions, but has only received a report of a review conducted by an entity under contract to the PSC staff. Interestingly, the report culminated nearly two years of review with recommendations of certain actions which, if they had been taken by BellSouth, would have been in violation of this Commission's rules, the Georgia PSC's rules, and/or IRS requirements. At this time, the Georgia Commission has conducted hearings on the various recommendations, but has adopted none of them.

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[34] Id.

[35] ITAA at 46.

Furthermore, testimony elicited from the staff's outside auditors during the course of these hearings reveals the danger of reliance by this Commission on summary descriptions of other regulatory proceedings as a basis for policy decisions. As the witness explained, this case differed from others in that the object of the subject review was not to "break the company."[36] The mere suggestion that an absence of bias was out of the norm raises significant questions about the credibility of many audit processes generally. Clearly, reliance on superficial summaries of such processes and the "conclusions" drawn therefrom to support "findings" of abuse by the BOCs is not warranted.

Moreover, the tactic of the opponents of alleging a bad act by one BOC and then attributing it to the industry as a practice cannot be sustained. To do so would be akin to indicting the entire IXC industry for what may be a practice in which at least MCI appears to be engaged.

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[36] Cost Allocation and Affiliated Transaction Audit of Southern Bell Telephone and Telegraph Company, Docket No. 5503-U, Hearing Transcript at 280 ("It wasn't our job, like in a rate case, to come along and try and break the company, and we didn't try to do that."). Whether that acknowledged, prevailing bias was present in this case, notwithstanding its denial, is debatable. At one point during intense cross-examination, the witness, when presented with uncontroverted evidence negating his premise, nonetheless responded in close-minded fashion, "You'll never get me to agree that this issue shouldn't be investigated." Id. at 1216.

Specifically, in at least one case of which undersigned counsel is personally aware, MCI offered $50.00 as an inducement for a residential customer to select MCI as the preferred interexchange carrier. The promotion promised that the $50.00 check would be sent "immediately" upon such selection. When the customer provided written acceptance of the offer, MCI mailed a check for only $35.00. Additionally, the $35.00 check was packaged as a separate offer, and its payment was conditioned on "activation" by selecting MCI as the preferred carrier by a specified date. Since the original $50.00 offer had been accepted, the customer did not act on the $35.00 offer. Perhaps not surprisingly, the customer has been switched to MCI for interLATA service, but has yet to receive the promised $50.00. Such marketing strategies using variations of the old "bait and switch" tactic could amount to millions of dollars of consumer trickery, if not fraud, by MCI alone. And of course, by the logic espoused by parties in this proceeding, the practice can also be attributed to other IXCs as well.

In fact, a picture can be painted that this is but one of many marketing abuses in which IXCs, including MCI, routinely engage. For instance, IXCs practically invented the practice that came to be known as "slamming" to steal

customers from one another[37] and continue to engage in that practice[38] notwithstanding the Commission's attempts to squelch it. IXCs have also engaged in grossly misleading and deceptive advertising and marketing practices, if some claims are to be believed.[39]

Nor should it be assumed that IXCs are the only group of opponents in this proceeding who have a track record of unpopular behavior. CompuServe, for example, was recently among those criticized by Congressman Ed Markey for its practice of selling mailing lists based on its customers' usage patterns or categories of interest.[40] It is ironic

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[37] See generally, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Notice of Proposed Rulemaking, 9 FCC Rcd 6885 (1994) (citing over 1700 complaints to the Commission in 1993 and nearly 2500 in 1994). Compare these thousands of complaints submitted to the Commission with the "dozens" of letters collected by ATSI over a multi-year period, which are alleged to "demonstrate a widespread pattern" of BOC misconduct. See, Compuserve at 47.

[38] See, e.g., Operator Communications, Inc. d/b/a Oncor Communications, Inc., Notice of Apparent Liability for Forfeiture, ENF 95-04, FCC 95-127 (March 31, 1995).

[39] AT&T and MCI, for example, in a flurry of litigation in late 1990 and early 1991 charged each other with numerous abusive practices including false, misleading, and deceptive promotional representations, slamming, and deceptive advertising. "Competition For Consumer Phone Market Heats Up as AT&T Sues MCI," Communications Daily, Jan. 11, 1990. See also, "Wiltel Files Suit Against AT&T for 'Malicious' Business Practices," Communications Daily, March 10, 1993.

[40] See, e.g., "Few On-Line Services Sell Subscriber Lists, They Tell Markey," Communications Daily, October 26, 1994, at 3 ("Markey said he was 'troubled by the wide variance of personal privacy protection' that sample of on-

(continued...)

that CompuServe and others like it stake out a claim to CPNI as if it were some inherent right. It also makes ESPs' past claims that they would hold CPNI delivered to them in confidence ring quite hollow.[41] Indeed, the potential for similar abuses by other ESPs clearly shows that they should not and cannot be entrusted with sensitive customer information.

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Thus it is with tabloid style pleadings that a whole industry may be painted as suspect based on generalized assertions, incomplete information, or unsubstantiated claims of abuse. Opponents of structural relief have once again demonstrated their mastery of that tactic. Even minimally closer examination of their stories, however, reveals their abject lack of credibility.[42] The BOCs were

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[40](...continued)
line service businesses showed."); "Prodigy and Compuserve Differ on Member Information," Communications Daily, October 25, 1994 ("Compuserve told Markey . . . it makes mailing lists, 'broadly based on member segments or selections,' available to outsiders. . . . Lists can be 'tailored to cover broad parameters requested by a potential mailing list customer,' [Compuserve] said.").

[41] See, e.g., Petition for Reconsideration of Cox Enterprises, Inc., CC Docket No. 90-263, filed March 2, 1992, at 5 ("The Commission apparently relies on the good faith conduct of the LECs in the use of CPNI. There is no reason to assume that ESPs will be any less responsible in their use of such information.").

[42] Similarly preposterous claims of undue influence or de facto control of industry forums and standards processes, e.g., MCI at 31-32 and Exhibit B; GeoNet, passim, are likewise shown to be grossly inaccurate in the separate
(continued...)